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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 643

AUSTIN SCARLETT,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, AUSTIN SCARLETT, respectfully prays for a Writ of Certiorari to the Court of Appeals of Maryland, to review the opinion of that Court entered in the above cause on January 9, 1952.

JURISDICTION

Jurisdiction is conferred upon the Supreme Court to review this case by Writ of Certiorari under Section 1254 of the Judicial Code (Title 28, U. S. C. A.), as enacted June 25, 1948.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Maryland Court of Appeals, in its Opinion affirming the judgment and sentence in the above entitled cause, ignored the fact that the Indictment departed from the well established principle that an Indictment must contain the particulars of which the crime permits, and which are necessary to a proper defense thereto, and which will protect the accused from again being placed in jeopardy, and, in addition, ignored the fact that the statute providing punishment maximum penalties on conviction of the crime of conspiracy, imposes judicial discretion upon the Court in imposing same.

QUESTIONS PRESENTED

1. Whether the Maryland Court of Appeals erred in upholding the trial Court's ruling in denying a motion to dismiss the Indictment based upon a lack of particularization therein.

2. Whether the Maryland Court of Appeals erred in upholding the sentence imposed by the trial Court, which sentence constituted an abuse of judicial discretion required by statute.

REASONS FOR GRANTING THE WRIT

1. The Maryland Court of Appeals ignored Article 21 of the Declaration of Rights, Constitution of Maryland, which provides that in all criminal prosecutions, every man hath a right to be informed of the accusation against him.

2. The Maryland Court of Appeals disregarded the formula for Indictments for conspiracy provided by statute, which contains substantially the same facts as provided

by the statutory form for Indictment for the substantive offense, which is the object of the conspiracy. Maryland Code of Public General Laws, 1951, Article 27, Section 46.

3. The Maryland Court of Appeals ignored the fact that the Indictment failed to follow the long settled rule that the charge should set forth the particulars of which the crime permits.

4. The Maryland Court of Appeals refused to consider the evidence showing the exact nature of the conspiracy in order to determine whether or not the trial Court in fixing sentence abused the discretion imposed upon it by statute.

WHEREFORE your Petitioner prays that a writ of Certiorari issue to the Court of Appeals of Maryland, commanding that Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all the proceedings of such Court of Appeals, had in this case, to the end that the judgment of the Court of Appeals of Maryland may be reversed, and that the petitioner be granted such other and further relief as may seem proper.

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IN THE

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No. ------

AUSTIN SCARLETT,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

The Indictment herein (No. 3555, 1951), originally contained six counts, charging that the Appellant, together with Harry Gross and Horace B. Cann, conspired together, and with divers unknown persons, did conspire to violate various provisions of Article 27, sub-title "Lotteries", of the Maryland Code (1939) (Apx. 3). A joint trial on said Indictment resulted in a general verdict of not guilty as to said Horace B. Cann, and guilty as to the Appellant, and said Harry B. Gross. A new trial was granted as to Scarlett and Gross, and the case remanded (Apx. 2).

At the outset of the second trial under said Indictment, a motion to dismiss same was filed on behalf of the defendant, Scarlett, which motion was overruled (Apx. 3-4).

The State thus entered a Nolle Prosequi as to Counts 2, 3, 4, 5, and 6 of said Indictment No. 3555. The trial then proceeded on the remaining Count, or Count 1, which charged that the defendants, on January 1, 1947, and continually thereafter until the 20th day of August, 1951, at Baltimore City, conspired "unlawfully to violate the lottery laws of the State of Maryland * * *" (Apx. 4).

There was no evidence adduced by the prosecution to show that the defendant, Scarlett, was other than a small time lottery operator. There was no evidence to show that the defendant, Scarlett, had ever been convicted of any of the provisions of the statute headed "Lotteries", Code of Public General Laws of Maryland.

The defendants, Horace B. Cann and Harry Gross, were acquitted, while the defendant, Austne Scarlett, was convicted. A motion for a new trial, duly filed, was denied.

On May 28, 1952, the Court entered a judgment as to Austne Scarlett (Petitioner) of seven (7) years in the Maryland Penitentiary, and a fine of two thousand dollars ($2,000.00), and costs. This was suspended upon an appeal to the Court of Appeals of Maryland.

On January 9, 1953, the Maryland Court of Appeals rendered an opinion affirming the judgment and sentence.

SPECIFICATION OF ERRORS

(a) The Court of Appeals erred in upholding the refusal to quash the indictment for conspiracy which failed to state, with the particularity of which the nature of the case permitted, the purpose or object of the conspiracy, and in so doing ignored the statutory form of indictment provided by the General Assembly of Maryland, and ignored the guarantees provided and embraced in Article 21

of the Declaration of Rights, Constitution of Maryland, thus depriving the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States.

(b) The Maryland Court of Appeals, in its opinion, erred in upholding the sentence imposed upon the Appellant (Petitioner), solely because same came within the maximum penalty for conspiracy fixed by statute, and in refusing to consider the real nature of the conspiracy to determine whether or not the sentence constituted an abuse of judicial discretion delegated by statute to the trial court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV:

> "Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 21, Declaration of Rights, Constitution of Maryland:

> "Art. 21. That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment or Charge in due time (if required) to prepare for his defense; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."

Statutory Form of Indictment for Conspiracy, Maryland Code of Public General Laws, 1951, Art. 27, Sec. 48:

> "48. In any indictment or warrant for the crime of conspiracy, it shall be sufficient to use a formula substantially to the following effect: 'That A. B. and C. D. on the ..... day of ..... 19 ...., at the County (City) aforesaid, unlawfully conspired together to murder X. Y. (or other conspiracy, here stating briefly the object of the conspiracy), against the peace, government, and dignity of the State.' "

Statutory penalty on conviction of indictable conspiracy. Maryland Code of Public General Laws, 1951, Art. 27, Sec. 46:

> "46. Every person convicted of the crime of conspiracy shall be liable to be punished by a fine not exceeding two thousand dollars, or imprisoned in the Jail or Maryland Penitentiary for not more than ten years, or both, in the discretion of the court; provided that all actions or prosecutions hereunder shall be commenced within two years after the commission of said offense."

The Maryland Code of Public General Laws (1951), Vol. 1, Art. 27, Secs. 405-415, provides as follows:

> "LOTTERIES
>
> "405. No person shall draw any lottery or sell any lottery ticket in this State; nor shall any person sell what are called policies, certificates or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall in any event or on the happening of any contingency entitle the purchaser or holder to receive money, property or evidences of debt."
>
> "406. All devices and contrivances designed to evade the provisions of the preceding section shall be deemed offenses against it."

"407. Every person, his aiders and abettors, offending against any of the provisions of the two preceding sections, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined for each offense any sum in the discretion of the court not less than two hundred dollars nor exceeding one thousand dollars, or imprisoned not less than three nor more than twelve months, or may be both fined and imprisoned as aforesaid."

"408. In addition to the penalties prescribed in the preceding section, any person who shall give money or any other thing for any lottery ticket, certificate, or any other device, by which the vendor promises that he or any other person will pay or deliver to the purchaser any money, property, or evidence of debt, on the happening of any contingency in the nature of a lottery, such person so giving may recover, as small debts are recoverable, from the person to whom he gave the same, or his aiders or abettors, the sum of fifty dollars for every lottery ticket, certificate or other device in the nature thereof so purchased or obtained by him."

"409. If any person shall keep any house, office or other place for the purpose of selling or bartering any lottery ticket, policy, certificate or any other thing by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall, in any event or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property or evidence of debt, he shall be subject to indictment, and upon conviction, he shall in the discretion of the court be fined a sum not exceeding one thousand dollars, or imprisoned for a period not exceeding one year, or he may be both fined and imprisoned."

"410. The owner of any house or office who shall permit the same to be used as a place for selling lottery tickets, or any of the things in the nature thereof mentioned in the preceding section shall be liable to indictment, and upon conviction shall, in the discretion

of the court, be fined a sum not exceeding one thousand dollars, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned; and any person who shall know that his house or office is used for such purpose shall be considered as permitting the same."

"411. If any person shall bring into this state any lottery ticket, policy, certificate or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall in any event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property or evidence of debt, or if any person shall have in his possession in this State any book, list, slip or record of the numbers drawn in any lottery, whether in this State or elsewhere, or any book, list, slip or record of any lottery ticket, or anything in the nature thereof mentioned in this section, or of any money received or to be received from, or for the sale of any such lottery ticket or thing in the nature thereof as aforesaid he shall be liable to indictment, and upon conviction shall in the discretion of the court be fined any sum not exceeding one thousand dollars, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned; providing, however, that this section shall not apply to any person who may have possession of any of the articles herein mentioned, for the purpose of procuring or furnishing evidence of violations of any of the provisions of law relating to lotteries."

"412. If any person shall by printing, writing or in any other way publish an account of any lottery, stating when or where the same is to be drawn, or the prizes therein, or any of them, or the price of a ticket or a share therein, or where any ticket may be obtained therein, or in any way aiding or assisting in the same, he shall on conviction be subject to a fine of one hundred dollars, or to imprisonment for the term of sixty days, at the discretion of the court."

"413. If any person shall insure, or receive any consideration for insuring, for or against the drawing of any ticket, or part of a ticket, policy or certificate, in any lottery whatsoever, or shall receive any money, property or evidence of debt, in consideration of any agreement to repay any sum, or to deliver the same or any other property or evidence of debt, if any ticket, or part of a ticket, policy or certificate, in any lottery whatsoever, shall prove fortunate or unfortunate, or shall be drawn or not drawn on any particular day or any particular order or otherwise howsoever, or shall promise or agree to pay or deliver any sum of money, property or evidence of debt, or forbear to do anything for the benefit of any person with or without consideration, on the happening of any contingency in the nature of a lottery, or shall publish any notice or proposal for the purposes aforesaid, he shall on conviction thereof be subject to a fine of any sum in the discretion of the court not less than one hundred dollars nor exceeding one thousand dollars, or be imprisoned not less than three nor more than six months, or may be both fined and imprisoned as aforesaid."

"414. Every grant, bargain, sale, conveyance or transfer of any real estate, or of any goods, chattels, things in action, or any personal property which shall hereafter be made in pursuance of any lottery, or for the purpose of aiding or assisting in such lottery, are hereby declared void and of no effect."

"415. If any person shall be a second time convicted of any of the offenses mentioned in any of the sections of this article relating to lotteries he shall on conviction be confined in the penitentiary not less than two nor more than five years; and any recovery of a penalty for violating any of the provisions of this article relating to lotteries, whether by indictment or action of debt, or before a justice of the peace, shall be regarded as a first conviction under this section."

ARGUMENT

A.

THE MARYLAND COURT OF APPEALS ERRED IN UPHOLDING THE REFUSAL TO QUASH THE INDICTMENT FOR CONSPIRACY, WHICH FAILED TO STATE, WITH THE PARTICULARITY OF WHICH THE CASE PERMITTED, THE PURPOSE OR OBJECT OF THE CONSPIRACY, AND IN SO DOING, IGNORED THE STATUTORY FORM OF INDICTMENT PROVIDED BY THE GENERAL ASSEMBLY OF MARYLAND, AND IGNORED ARTICLE 21 OF THE DECLARATION OF RIGHTS, CONSTITUTION OF MARYLAND, THUS DEPRIVING THE PETITIONER OF DUE PROCESS OF LAW, UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Indictment fails to state, with the particularity of which the charge permits, the purpose or object of the conspiracy.

The Indictment charges that Appellant and others unlawfully conspired "unlawfully to violate the lottery laws of the State of Maryland, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace, dignity, and government of the State".

There are sixteen sections under the sub-head "Lotteries", in the Maryland Code of Public General Laws (1939) Article 27, Secs. 405-420. Said sections set forth various offenses under said sub-title, as follows: to sell lottery tickets (Sec. 405); to keep a house, office, or other place for the purpose of selling lottery tickets (Sec. 409); to permit a house or office to be used for sale of lottery tickets (Sec. 410); to bring into the State a lottery ticket or have same in possession (Sec. 411); to publish an account of any lottery by printing, writing, or in any other way (Sec. 412); to insure or receive any consideration for insuring for or against the drawing of any lottery ticket (Sec. 413). In addition, Sec. 413 provides that said pro-

visions relating to lotteries shall be liberally construed. This latter section was applied to the sale of an Austrian Government bond which paid a premium of twenty percent on a contingency. *Ballock v. State*, 73 Md. 5.

It is submitted that the Indictment herein fails to meet the test which the law requires as to sufficiency of indictments generally, and as to conspiracy indictments in particular.

This test as to indictments generally is well stated in *Wimpling v. State*, 171 Md. 362, as follows:

> "It is axiomatic that an indictment must describe the offense with which it charges the defendant with sufficient particularity to inform him of its nature, and to permit him to plead and judgment that may be entered in the case in bar of any future prosecution for the same offense it is sufficient to charge the offense in the words of the statute, but with such other particulars as may be necessary to identify that particular offense and distinguish it from all others in order that the defendant may be sufficiently apprised of the charge against him to prepare his defense."

In *State v. Lassotovich*, 162 Md. 147, an indictment of a contractor on public work for paying less than the rate of per diem wages current in the locality in violation of a statute was charged in the language thereof. However, the indictment was held demurrable in that it failed to give the name of the employee or employees so underpaid. In that case the Court (p. 156) stated the rule as follows:

> "Every charge or accusation whether at common law or under statute must include at least two elements: First, the characterization of the crime, and Second, such description of the particular act alleged to have been committed by the accused as will enable him to properly defend against the accusation."

In statutory crimes where the statute includes the elements necessary to constitute a crime, the first of these requirements is gratified by characterizing the offense in the words of the statute; the second requires such definite and specific allegations as reasonably to put the accused on notice of the particular act charged to enable him to prepare a defense and plead the judgment in any subsequent attempted prosecution.

The Indictment in the instant case complies with neither of these requirements. First, it not only does not charge in the language of the statute, but charges simply a conspiracy to violate a generic phrase, descriptive of said a-title, i.e., "Lotteries", of Article 27, of the Code of Public General Laws of Maryland, to wit, "the lottery laws of the State of Maryland".

The Indictment does not particularize the object and purpose of the conspiracy so as to enable the accused to properly prepare a defense, and to prevent him from again being placed in jeopardy thereon.

No case has been found anywhere upholding as sufficient an indictment similar to that in the instant case, namely, one charging a conspiracy to violate a generic phrase of the title to a statutory crime.

The only formula provided by statute in Maryland for indictment for conspiracy closely follows the wording provided by statute for such substantive crime itself. Thus, the form provided by statute (Maryland Code of Public General Laws, Vol. 1, Art. 27, Sec. 665), for murder or manslaughter, reads:

> "That A. B., on the ..... day of ..... nineteen hundred and ....., at the county aforesaid, feloniously (wilfully and of deliberately premeditated malice aforethought) did kill (and murder) C. D."

The form of indictment provided by statute (Maryland Code of Public General Laws, Vol. 1, Art. 27, Sec. 48), for conspiracy, reads:

> "* * * that A-B and C-D on the ..... day of ....., 19...., at the County (City) aforesaid, unlawfully conspired together to murder X-Y (or the conspiracy here stating briefly the object of the conspiracy), against the peace, government and dignity of the State."

If the Indictment in the instant case is sufficient, then despite the statute, an Indictment charging a conspiracy to "violate the murder laws of the State", should be held sufficient.

B.

THE MARYLAND COURT OF APPEALS IN ITS OPINION ERRED IN UPHOLDING THE SENTENCE IMPOSED UPON THE APPELLANT (PETITIONER) SOLELY BECAUSE SAME CAME WITHIN THE MAXIMUM PENALTY FOR CONSPIRACY FIXED BY STATUTE, AND IN REFUSING TO CONSIDER THE REAL NATURE OF THE CONSPIRACY IN ORDER TO DETERMINE WHETHER OR NOT THE SENTENCE CONSTITUTED AN ABUSE OF JUDICIAL DISCRETION DELEGATED BY STATUTE TO THE TRIAL COURT.

Prior to statutory enactment fixing maximum penalty upon conviction of conspiracy, the Maryland Court of Appeals held that a sentence of ten (10) years imprisonment on conviction of conspiracy to blow up by a dynamite bomb an occupied dwelling, did not constitute cruel and unusual punishment within the prohibition of Article 25 of the Declaration of Rights, Constitution of Maryland. *Lanasa v. State*, 109 Md. 602.

Subsequently, by Act of 1927, Ch. 651, Code, 1939, Art. 27, Sec. 42, the punishment for conviction of conspiracy was fixed, as follows:

> "Every person convicted of the crime of conspiracy shall be liable to be punished by a fine not exceeding

two thousand dollars, or imprisonment in the jail or the Maryland House of Correction or the Maryland Penitentiary, for not more than ten years, or both, in the discretion of the Court. * * *"

The imposition of the maximum punishment as provided by the statute should unquestionably be upheld as a proper exercise of judicial discretion. Should the Lanasa case, or one of similar maliciousness and inhumanity, be presented for imposition of punishment today, for example, a conspiracy to kill human beings indiscriminately and solely for a monetary reward, such as have occasionally cropped up in recent years and characterized as "Murder for Hire" and "Murder, Incorporated".

It is conceivable that on conviction for conspiracy to violate the provisions of the lottery statute, wherein the evidence shows the defendant to be a criminal overlord, a "vice-king" operating on a gigantic scale in various sections of the United States, an imposition of seven years' imprisonment might be held to be a proper exercise of judicial discretion.

In the instant case, however, the person convicted of conspiracy "to violate the lottery laws" is not shown by the record to have any previous criminal record, nor any previous conviction of any provision of the lottery statute, and there is nothing in the record tending, in the smallest degree, to show him to be other than a small operator of a lottery.

While the Indictment in the instant case charges a continuous covering of the period from January 1, 1947, down to August 12, 1950, there is no evidence to support it as to the period from 1947 until 1950. From alleged acts and conduct of the defendants in the year 1950, the conspiracy might be inferred as to that year.

Under Federal laws, since the Act of June 25, 1948, a person who is convicted of criminal conspiracy "shall be fined not more than ten thousand dollars, or imprisoned for more than five years". Said statute further provides: "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment shall not exceed the maximum punishment provided for such misdemeanor." 18 U. S. C. A., Sec. 371.

The General Assembly of Maryland, while it did not limit the maximum punishment on conspiracy to commit a substantive offense to the maximum punishment provided by statute for conviction of said substantive offense, did provide a safeguard, viz., by providing in the case of conspiracies, that the Court should exercise judicial discretion in imposing sentence.

Your Petitioner does not contend that the Judge, in imposing sentence on Petitioner, was limited to the same punishment, i.e., one year's imprisonment and one thousand dollars fine provided for a first conviction. This is true by statute in the Federal courts, but there is no similar statute in Maryland. Nevertheless, it is submitted that said punishment is a factor to be considered by the Court in exercising its judicial discretion imposed upon it by the Legislature of the State of Maryland.

Another factor which the Court should have considered in exercising its discretion as to the punishment to be imposed on your Petitioner, was the fact that nothing in the record shows the Appellant to have been other than a small lottery operator.

Furthermore, while the Indictment in the instant case charges a conspiracy continuously from January 1, 1947, down to the 20th day of August, 1951, there is not a scintilla

of evidence to support it, except by inference from alleged overt acts and conduct of the defendants in the year 1950.

The Opinion of the Court of Appeals in the instant case refused to consider the evidence in the record showing the real nature of the conspiracy necessary in order to determine whether the trial court had abused its judicial discretion, on the theory that it could not pass upon the sentence, because same did not exceed the maximum penalty therefor permissible by statute, saying:

> "We emphasized in *Delnegro v. State*, Md., 81 A. 2d 241, that the Court of Appeals will not oppose the judicial power against the legislative power to define crimes and to fix their punishment, except where the power of the Legislature encounters in its exercise a constitutional prohibition, and in such a case an imperative duty is invoked. The Legislature has provided that every person convicted of the crime of conspiracy shall be liable to be punished by a fine of not exceeding two thousand dollars ($2,000.00), or imprisonment for not more than ten years, or both, in the discretion of the Court. Laws, 1927, Ch. 651, Code 1951, Art. 27, Sec. 46. The Court below imposed upon Appellant a sentence considerably below the maximum punishment prescribed by the statute."

CONCLUSION

The indictment of Austin Scarlett on an indictment charging him with conspiracy to violate the lottery laws of the State of Maryland, without mentioning any facts constituting a violation of any of the various forms of the statutory crime designated as "Lotteries", in Article 27 of the Code of Public General Laws of Maryland, resulted in a verdict of guilty, deprived the Petitioner of the protection of the settled common law, well established by decisions of the Maryland Court of Appeals, and set forth in

the Maryland statutes and the Declaration of Rights of the Maryland Constitution.

The sentence and judgment based upon the verdict of guilty constituted a violation of the judicial discretion imposed upon the Court in fixing sentence in that type of crime.

Such procedural conduct was a denial of Due Process of Law guaranteed unto the Petitioner by the Fourteenth Amendment to the Constitution of the United States, and for this reason, the judgment should be reversed.

Respectfully submited,

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APR 25 195
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 643

AUSTIN SCARLETT,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United S States

OCTOBER TERM, 1952

No. ------

AUSTIN SCARLETT,

PetPetitioner,

vs.

STATE OF MARYLAND,

Respespondent.

BRIEF IN OPPOSITION TO PETITION N FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to to the Court of Appeals of Maryland. Petitioner was indictdicted by the grand jury of Baltimore City under a charge of of unlawful conspiracy with one Harry Gross and with certertain other persons, unknown to the Grand Jurors, to violatdate the laws of the State of Maryland relating to lottery. The cne conspiracy allegedly took place between January 1, 1947, an and August 20, 1951. Petitioner was tried before the HonIonorable E. Paul Mason, Associate Judge of the Supreme ne Bench of Baltimore City, and a jury. The jury returned ed a verdict of guilty.

A motion for new trial was filed and overrulruled by the Supreme Bench of Baltimore City and Petitititioner was

sentenced to serve a term of seven years in the Maryland Penitentiary and to pay a fine of $2,000 and court costs. Petitioner appealed from that judgment to the Court of Appeals of Maryland. The judgment below was affirmed by a unanimous decision of that Court in an Opinion by Judge Delaplaine, filed on January 9, 1953 (66-73)*, ... Md. ...., ... A. (2d) .... (reported in The Daily Record, Baltimore, Maryland, April 7, 1953).

QUESTIONS PRESENTED

I.

Was Petitioner deprived of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States by the action of the Trial Court (affirmed by the Court of Appeals of Maryland) in overruling Petitioner's Motion to quash the indictment?

II.

Was Petitioner deprived of any rights guaranteed by the Constitution of the United States as a result of the sentence imposed by the Trial Court (Affirmed by the Court of Appeals of Maryland)?

STATEMENT OF THE FACTS

On August 10, 1950, Officer Allen Carey of the Baltimore Police Department observed the premises 604 North Arlington Avenue, Baltimore, Maryland, under instructions of Captain Alexander L. Emerson (15). He saw Petitioner enter the premises in question, at about 12:50 P. M. Shortly thereafter, two automobiles drove up to the premises, one behind the other. One vehicle bore Maryland Tag No. 171-191; and the other (a Buick), Maryland Tag No.

*References are to transcript of record.

201-316 (15). The Buick was titled in the name of Petitioner (5-6). The driver of that car (a colored man) parked the vehicle across the street from the suspected premises, left the car carrying a cigar box and a brown paper bag, walked across the street and entered the house. A short time later, the same man left the premises carrying a cigar box and a paper bag, entered the automobile and drove away (15). Officer Carey left the vicinity at about 2 P. M., at which time Petitioner was still in the house (16).

On August 11, 1950, Captain Emerson, having obtained a search and seizure warrant for 604 North Arlington Avenue, raided those premises along with other officers (6, 8). They were admitted by one Mabel Wilkes. Thomas Wilkes was seated at a table in the dining room. On that table, the officers found an adding machine (serial number 9-130438) and some lottery slips (8). After some discussion with Mabel and Thomas Wilkes (also known as Roger Wilkes) the officers went to the front room on the second floor where they found a quantity of lottery slips for August 10th, in a wardrobe. They also found two telephones and some bills made out to Petitioner; also a billfold of Petitioner in the possession of Mabel Wilkes' eighteen year old son, of whom Petitioner was apparently the father (8). After further discussion with Thomas Wilkes, he reached down behind a sofa and handed over to the police an additional quantity of lottery slips for August 11th (8). A number of the lottery slips found by the police showed that the writer's identification was "M. C." (9). Neither Petitioner nor his co-defendant Harry Gross was on the premises during the raid.

The adding machine, referred to above, was returned to Thomas Wilkes on March 6, 1951 (13), and on the same

day it was pledged by Petitioner for a loan of $25.00 from the B. and F. Loan Company, (59-60).

On August 12, 1950, Captain Emerson swore out a warrant for the arrest of Petitioner, charging him with setting up and maintaining a lottery operation in the premises 604 North Arlington Avenue. This warrant was in standard form and was directed "to any officer, or one of the constables of the City of Baltimore" (43). That warrant was served on August 12, 1951, inside the home of Petitioner, 2501 McCulloh Street, Baltimore, Maryland (10-11). At the time of service, the officers observed some envelopes which contained lottery slips on a table. They also found, in a dresser in the front bedroom, additional lottery slips. The writer of those slips was identified theron as "M. C." (12). In the basement of that house, the officers found two adding machines (12).

At the trial, Edgar Wilkes testified on behalf of the State. He had lived at 604 North Arlington Avenue for about nine years prior to the date of the raid (60). He had known Petitioner for about twelve years. Petitioner is also known as Marcus Garvey (60). Witness had worked for Petitioner in connection with a lottery operation late in 1949 and early in 1950 (17, 18). He used to drive Petitioner and would "pick up the lottery work" for Petitioner (17, 61-64).

Horace B. Cann also testified on behalf of the State. He knew both Petitioner and his co-defendant Harry Gross. He knew Petitioner not only as Austin Scarlett, but also as Marcus Garvey (19). On one occasion he saw Gross and Petitioner talking together on the street corner (19). After their conversation was concluded, Gross came over and asked him if he knew Petitioner. Gross told Cann

that "he (meaning Scarlett) was in the numbers business, he would like for me to be a good man to write numbers" (19-20). After considering the proposal, he did write numbers until he was arrested on June 29, 1951 (20). On several occasions he saw Petitioner pick up lottery from Harry Gross (64-65). He got his lottery books from Petitioner and Gross (65). Four days after his arrest he met Petitioner on Sharp Street. Petitioner asked him how he got caught. He asked Petitioner what he was "going to do for me" (21). Subsequently, he obtained Petitioner's telephone number from a friend and asked Petitioner about getting him a lawyer and also about paying him a salary while confined, if he received a jail sentence in connection with the lottery charge (21). Petitioner "promised to give me $40.00 a week, and he told me to go up Perkins' office 9:15 Wednesday morning to appear for trial, Perkins would be my lawyer" (21). At the trial Cann was convicted and sentenced to serve a term of six months in the House of Correction, and to pay a fine of $750.00 (21). After serving a portion of his sentence, and after Petitioner had failed to keep his promise to pay him $40.00 a week while confined, he determined that he would tell the court the name of his backer, viz. Scarlett.

Roger Wilkes, (also known as, and referred to above as, "Thomas Wilkes") a brother of Edgar Wilkes, testified on behalf of Petitioner. He stated that he knew Petitioner; that, so far as he knew, Petitioner had nothing to do with the lottery operation at 604 North Arlington Avenue; that such operation was conducted by Richard Lyons and a man named Epps (32). The witness had been charged in connection with that operation, had pleaded guilty, and had been sentenced by the trial court (32).

Harry Gross testified in his own behalf. He denied that he had ever been in the lottery business; that he knew Petitioner either as Scarlett or as Marcus Garvey; that, although he had told the State's Attorney he knew a man by the name of Marcus Garvey, Petitioner was not that man; that he had never had any dealings whatsoever with Petitioner (34). He further denied that he had ever put the witness Cann in the number writing business, and that he had ever picked up any numbers written by Cann (35).

Petitioner did not testify.

ARGUMENT

I.

WAS PETITIONER DEPRIVED OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY THE ACTION OF THE TRIAL COURT (AFFIRMED BY THE COURT OF APPEALS OF MARYLAND) IN OVERRULING PETITIONER'S MOTION TO QUASH THE INDICTMENT?

Petitioner contends that the indictment fails to state, with sufficient particularity, the purpose or object of the conspiracy and that such failure deprived him of due process of law, contrary to the requirements of the Fourteenth Amendment to the Constitution of the United States.

The indictment charges that Petitioner and others "unlawfully conspired together, and with certain other persons to the Jurors aforesaid unknown, unlawfully to violate the lottery laws of the State of Maryland * * *".

The question of the sufficiency of this form of indictment was presented to the Court of Appeals two times during the present Term of Court in addition to the instant case: *Hurwitz v. State*, ... Md. ...., 92 A. (2d) 575, 577-580

(Opinion by Markell, J.), and *McGuire v. State,* Md. , 92 A. (2d) 582, 583 (Opinion by Henderson, J.).

In *Hurwitz v. State, supra,* after considering the question at some length, Judge Markell said:

> "* * * The words 'to violate the lottery laws of the State' have a promiscuous sound, but by comparison with sections 423-438 mean, in substance, to participate in the conduct of a lottery, as broadly defined. Sections 423-438, with considerable tautology, prohibit drawing a lottery, selling a lottery ticket, sec. 423, keeping or permitting to be used a house as a place for selling lottery tickets, secs. 427-428, bringing into the State or having in possession, sec. 429, lottery tickets, — in short, practically every incident of the conduct of a lottery except buying a lottery ticket. We express no opinion as to whether any provision of the lottery laws makes it a criminal offense for a customer to buy a lottery ticket.
>
> "On the authority of State v. Buchanan and later cases in this court, and in view of the evident meaning of 'the lottery laws of the State', we hold that the first count of the instant indictment validly stated an offense and not a mere conclusion of law. In so holding we limit our decision to the case before us, and do not approve as a general formula for the statement of the object of a conspiracy, 'to violate the ..... laws of the State'."

The views expressed by Judge Markell in *Hurwitz v. State, supra,* were reiterated by the Court in *McGuire v. State, supra,* and in the instant case. It is patently clear that the indictment involved in the instant case is sufficient in the State of Maryland.

In spite of the fact that Petitioner asserts that a Federal question is here presented, Respondent respectfully sug-

gests to the Court that this point does not raise a Federal question for determination by this Court.

The question of the sufficiency of the indictment in this case is clearly one of State practice and procedure. Even if the Trial Court, and the Court of Appeals of Maryland on appeal, erred in the decision, the error does not constitute denial of due process of law, as that phrase is used in the Fourteenth Amendment to the Constitution of the United States. *Gryger v. Burke, Warden,* 334 U. S. 728, 731, 92 L. Ed. 1683, 1687; *West v. Louisiana,* 194 U. S. 258, 262, 48 L. Ed. 965, 969.

II.

WAS PETITIONER DEPRIVED OF ANY RIGHTS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AS A RESULT OF THE SENTENCE IMPOSED BY THE TRIAL COURT (AFFIRMED BY THE COURT OF APPEALS OF MARYLAND)?

Finally, Petitioner claims that he was deprived of rights guaranteed by the Constitution of the United States by the sentence imposed by the Trial Court. As stated above, Petitioner was sentenced to serve a term of seven years in the Maryland Penitentiary and to pay a fine of two thousand dollars and court costs.

It is clear that no Federal question is presented under this point. The Supreme Court of the United States in numerous decisions has held that the Eighth Amendment to the Constitution of the United States is addressed to the courts of the United States exercising criminal jurisdiction and does not apply to the States. *Ex parte Watkins,* 7 Pet. 568, 8 L. Ed. 786; *Barron v. Baltimore,* 7 Pet. 243, 247, 8 L. Ed. 672; *Dutton v. State,* 123 Md. 373; *Foote v. State,* 59 Md. 264.

CONCLUSION

It is respectfully submitted that there is no merit to either of the contentions raised by Petitioner and that there is no Federal question presented for the consideration of this Court, and that, therefore, the Petition should be denied.

Respectfully submitted,

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